

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. 2006020279

**ORDER DENYING MOTION TO
DISQUALIFY COUNSEL**

On February 8, 2006, the Office of Administrative Hearings (OAH) received a due process complaint request (Complaint) from attorney Barrett K. Green of the law firm Littler Mendelson, on behalf of Petitioner Los Angeles Unified School District (District). The Complaint names Student as the Respondent, and identifies as the sole hearing issue whether the District has the right to assess the Student despite the parents' lack of consent.

On April 4, 2006, OAH received from attorney Marcy J.K. Tiffany of the law firm Wyner & Tiffany, on behalf of the Student, a motion to disqualify Mr. Green and Littler Mendelson from representing the District in this proceeding. In that motion, the Student states that he seeks to call Mr. Green as a witness because a "Special Education Assessment Notification" document from the District listed Mr. Green as the individual who referred the Student for assessment. Thus, the Student contends that Mr. Green is a necessary witness, and that allowing Mr. Green to testify while he and Littler Mendelson represent the District would compromise the integrity of the judicial process.

On April 13, 2006, OAH received from Mr. Green, on behalf of the District, an opposition to the Student's motion. On April 14, 2006, OAH received the Student's reply to the District's opposition.

BRIEF SUMMARY OF BACKGROUND FACTS

The following factual findings are made for the purposes of this motion only. In 2003, the identical parties participated in a special education due process hearing before the California Special Education Hearing Office (SEHO), the agency which heard due process disputes prior to July 1, 2005. The issues in that case were whether the Student was eligible for special education and whether the District had assessed the Student in all areas of suspected disability.

In October and November 2005, following an appeal of the SEHO decision to the federal district court, the above-named attorneys for the parties engaged in electronic mail (e-mail) correspondence regarding convening an individualized education program (IEP) meeting and whether the District could conduct new special education testing of the Student. On or about November 9, 2005, the Student's parents received from the District a document entitled "Special Education Assessment Notification." The document notified the parents that the Student had been referred for special education assessment, and indicated that the referral for assessment was made by Barrett Green of Littler Mendelson, P.C.

The Student's parents did not consent to the proposed assessment. On January 24, 2006, OAH received a Complaint against the District from Ms. Tiffany on behalf of Student, again raising the issue of the Student's eligibility for special education; that case is identified as *Student v. Los Angeles Unif. Sch. Dist.*, OAH No. N2006010876. On February 8, 2006, OAH received the Complaint in the present matter from Mr. Green on behalf of the District.

APPLICABLE LAW

Rule of Professional Conduct 5-210, of the California Bar Rules, provides that, except under limited exceptions, an attorney shall not act as an advocate before a jury that will hear testimony from the attorney unless the attorney has the informed written consent of the client. When such circumstances arise, trial courts have discretion to order an attorney who may appear as a witness to withdraw from representing the client. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580 [70 Cal. Rptr. 2d 507, 511]; *Lyle v. Superior Court* (1980) 122 Cal. App. 3d 470, 482 [175 Cal. Rptr. 918].) In exercising this discretion, a trial court "must weigh the competing interests of the parties against potential adverse effects on the integrity of proceeding before it and should resolve the close case in favor of the client's right to representation by an attorney of his or her choice. (*Smith, Smith & Kring, supra*, 60 Cal.App.4th at 580 (quoting *Lyle v. Superior Court, supra*, 122 Cal. App. 3d at p. 482.) The court must determine whether there was "a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process." (*Ibid.*)

In determining whether there is injury to the integrity of the judicial process, the court must first consider “the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel already familiar with the case.” (*Smith, Smith & Kring, supra*, at 580 [citations omitted].) Second, the court must consider the possibility opposing counsel is using the motion to disqualify for purely tactical reasons. (*Id.* at 581 (citing *Comden v. Superior Court*, (1978) 20 Cal. 3d 906, 915.) Finally, “whenever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel’s testimony is, in fact, genuinely needed.” (*Ibid.* (quoting *Reynolds v. Superior Court*, (1986) 177 Cal. App. 3d 1021, 1027.) In determining the necessity of counsel’s testimony, the court should consider “the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established.” (*Ibid.* (quoting *Comden v. Superior Court, supra*, 20 Cal. 3d at p. 913; *Graphic Process Co. v. Superior Court*, (1979) 95 Cal. App. 3d 43, 50.)

Moreover, federal courts in California have held that, in most instances, an attorney lacks standing to seek disqualification of opposing counsel. (*Canatella v. Stovitz* (N.D.Cal. 2004) 2004 U.S. Dist. Lexis 24266, p. 8 (citing *Colyer v. Smith* (C.D.Cal. 1999) 50 F. Supp. 2d 966, 969.) As the *Colyer* court explained, “regardless of the contents of the applicable rules of conduct, an attorney can have no sufficiently personal ‘injury in fact’ based on the conflict status of her opposing counsel to move to disqualify that adversary. (*Colyer, supra*, 50 F. Supp. at 969.) Indeed, the Ninth Circuit Court of Appeals has determined that “the drafters of the ABA Code have cautioned that the ethical rules [were] not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.” (*Optyl Eyewear Fashion International v. Style Companies* (9th Cir. 1985) 760 F.2d 1045, 1050 (quoting Model Code of Professional Responsibility, Canon 5 n.31).) As the *Optyl Eyewear* court explained, “because of this potential for abuse, disqualification motions should be subjected to ‘particularly strict judicial scrutiny.’” (*Optyl Eyewear, supra*, 760 F.2d at 1050 (quoting *Rice v. Baron*, 456 F. Supp. 1361, 1370 (S.D.N.Y. 1978).)

DISCUSSION

Preliminarily, Rule of Professional Conduct 5-210 concerns only an attorney’s role in testifying in a jury trial. Petitioner does not cite, nor is the administrative law judge (ALJ) aware of, any professional rules or other authority limiting when an attorney may act as an advocate before an ALJ who will hear testimony from the attorney.

However, further consideration of whether this prohibition applies in non-jury trials is unnecessary because, even if Rule 5-210 was applicable to administrative hearings before an ALJ, the Student's motion fails to establish any grounds for disqualification of Mr. Green or his law firm. First, pursuant to the Ninth Circuit's ruling in *Optyl Eyewear, supra*, 760 F.2d at 1050, the Student has not met his burden of proving that he has standing to bring the present motion. Indeed, the Student's motion alleges that, if Mr. Green testifies, he "will be placed in the untenable position that, by testifying truthfully, he is likely to prejudice his client's legal position." Since neither the Student nor his attorney have standing to raise conflict-of-interest concerns on behalf of the District, the Student's argument on this point is irrelevant.

Although the Student appears to lack standing to file this motion, for purposes of thoroughness this order will address the motion's substantive claims. When comparing the competing interests of the parties against potential adverse effects on the integrity of this due process proceeding, the present situation does not even rise to the level of the "close case" mentioned in the *Smith, Smith & Kring* and *Lyle* opinions. Of primary importance is the Student's failure to establish that Mr. Green's testimony is genuinely needed. On this point, the Student's motion asserts that "it will be necessary to call Mr. Green as a witness to testify whether he, in fact, made the referral for assessment, and, if so, what were his reasons for making the referral." This assertion fails on several counts. First, Mr. Green would likely not be able to provide relevant testimony regarding "his reasons for making the referral," because attorney-client privilege would prohibit his disclosure of that information and would render any such testimony inadmissible. (See Cal. Evid. Code §§ 917, subd. (a), 952, 954.) Second, whether the District has a right to conduct a special education assessment of the Student depends on whether the Student has areas of suspected disability that require further assessment; in contrast, the District's reasons for seeking to assess are not among the issues to be decided. (See Cal. Ed. Code §§ 56320, 56506, subd. (e); 20 U.S.C. § 1414(a)(1)(D)(ii)(I); *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315.) Even if the presiding ALJ allows testimony regarding the District's motive in seeking the assessment, it is most likely that other witnesses, such as District employees, would be available to provide such testimony in lieu of Mr. Green.

For all of the above reasons, the Student has failed to establish that Mr. Green's testimony is genuinely needed. Considering also that the District has a strong interest in retaining the counsel of its choice, the possibility that opposing counsel may have filed this motion for tactical reasons, and the particularly strict judicial scrutiny applicable to this type of motion, the pertinent factors weigh heavily in favor of denying the Student's request to disqualify counsel.

ORDER

The Student's motion to disqualify the District's counsel is denied.

Dated: April 25, 2006

SUZANNE B. BROWN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings